

EXHIBIT 7

1 IN THE UNITED STATES DISTRICT COURT
 2 IN AND FOR THE DISTRICT OF DELAWARE
 3
 4 S.O.I. TEC SILICON ON INSULATOR : Civil Action
 5 TECHNOLOGIES S.A. and :
 6 SOITEC USA, INC., :
 7 :
 8 Plaintiffs and :
 9 Counterclaim Defendants, :
 10 v. :
 11 MEMC ELECTRONIC MATERIALS, INC., :
 12 :
 13 Defendant and :
 14 Counterclaim Plaintiff. : No. 05-806(GMS)
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1 different first names, so that is how I am probably going to
 2 refer to you.
 3 There is a couple of motions regarding some
 4 discovery disputes.
 5 Counsel, before we begin, just a couple of
 6 reminders: One, state your name before you begin speaking
 7 so that the court reporter, who today is Kevin Maurer, by
 8 the way, knows who is speaking.
 9 Also, counsel, this is now Judge Sleet's case,
 10 and he has not reassigned it to me. But I felt, in light of
 11 the fact that we had had discussions about discovery
 12 matters, rather than passing it back to Judge Sleet, I
 13 should just handle it and take care of it for him. I can't
 14 predict what is going to happen in the future in this case.
 15 I just don't know. So I am not giving you much direction,
 16 if there is any other discovery matters that arise.
 17 All right. Let's take them in some type of
 18 order. Why don't we take the motion for protective order
 19 and to exclude a conflicted expert witness, which I believe
 20 is Soltec's issue.
 21 MR. BRODY: That is correct, Your Honor. Would
 22 you like us to speak to it?
 23 THE COURT: Sure.
 24 MR. BRODY: I think it's pretty straightforward.
 25 We contacted Dr. Rozgonyi a number of months

1 APPEARANCES CONTINUED:

2 PATRICIA SMINK ROGOWSKI, ESQ.
 3 Connolly Bove Lodge & Hutz, LLP
 4 -and-
 5 ROBERT M. EVANS, JR., ESQ., and
 6 MARC W. VANDER TUIG, ESQ.
 7 Senniger Powers
 8 (St. Louis, MO)

9 Counsel for Defendant
 10 and Counterclaim Plaintiff

11 THE COURT: Good morning. This is Judge Thyng.
 12 (Counsel respond "Good morning.")

13 THE COURT: Counsel, before we begin, who is on
 14 the line for Soltec?

15 MR. BRODY: This is Michael Brody, Your Honor.

16 THE COURT: All right.

17 MR. CICERO: Your Honor, Joseph Cicero from the
 18 office of Edwards Angell Palmer & Dodge here in Wilmington.
 19 Michael Brody is on from Winston & Strawn, and Brian Gaff is
 20 on from our Boston office.

21 THE COURT: All right. Thank you.

22 Who is on the line on behalf of the defendants,
 23 then?

24 MS. ROGOWSKI: Yes, Your Honor. This is Pat
 25 Rogowski of Connolly Bove for MEMC. Also with me will be
 26 Bob Evans and Marc Vander Tuig from Senniger Powers.

27 THE COURT: Thank you. All of you have

1 ago. There was an initial conversation in which Mr. Gaff
 2 described some of our theories of the case. There was a
 3 followup conversation between Dr. Rozgonyi, myself, and Mr.
 4 Neuner in which we had some further discussions.

5 Dr. Rozgonyi quoted us a rate. And when we told
 6 him it sounded okay to us, he told us he was going to be
 7 working for MEMC.

8 There is no question that we sent him a copy of
 9 the patent. There is an e-mail from him giving a
 10 preliminary read on the patent and on the theories that we
 11 had discussed with him.

12 THE COURT: Why don't you point out to me, Mike,
 13 if you wouldn't mind, in your submission where that shows a
 14 copy of the patent, the preliminary read.

15 MR. BRODY: Sure. That is -- hold on.

16 THE COURT: I know it's under Exhibit A. It's
 17 what page under Exhibit A?

18 MR. GAFF: Your Honor, I believe that's Exhibit
 19 A, Page 1.

20 THE COURT: The actual first page.

21 MR. GAFF: Yes. There is a series of three
 22 e-mails on there. At the bottom of that page is the initial
 23 e-mail from me to Dr. Rozgonyi enclosing the patent. And
 24 then, just above that, there is an excerpt of another e-mail
 25 from me, directing him to particular column and lines in the

1 patent.

2 THE COURT: I just want to double-check, so I
3 make sure we are both on the same page, if you excuse the
4 expression. "Please see, e.g., Column 23, Lines 8 through
5 12"?

6 MR. GOFF: Right. That is a snippet of a second
7 e-mail that I sent to Dr. Rozgonyi after the one just below
8 that on that page, thanking him for his time. Then Dr.
9 Rozgonyi's response is the top of that page.

10 THE COURT: Okay. I am trying to go through
11 this. Are you saying the one, "I took a quick look at the
12 patent and think I could help with demonstrating how weak
13 MEMC's position is"?

14 UNIDENTIFIED SPEAKER: Yes.

15 THE COURT: Then he relates to you, he will be
16 at the Hilton and he is off to Italy in two weeks.

17 UNIDENTIFIED SPEAKER: That's right.

18 THE COURT: I have read through these. I wanted
19 to make sure what sections you were actually relying on. I
20 have them highlighted.

21 MR. BRODY: Mr. Gaff, Brian has certainly
22 pointed out the passage.

23 We are not pretending like we asked Dr. Rozgonyi
24 to spend hundreds of hours on this matter. But there
25 clearly was a series of discussions in which we shared with

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1 him our thinking about the case and in which he gave us an
2 initial response that was sufficient for us to conclude
3 that -- and, frankly, for him to initially conclude that he
4 could go forward and provide us with expert support in the
5 matter.

6 The case that I think gets cited here is the
7 Koch Refining case.

8 THE COURT: I have read through that. I have
9 also read through the Hewlett-Packard Company matter.

10 MR. BRODY: Okay. I think the reality, the Koch
11 case kind of sets out two, you know, polar extremes. One is
12 the case where you have basically an extended compensated
13 relationship, and the other is where there is one call. And
14 I think we are clearly in between those.

15 Here we would say that at the one extreme is, as
16 Koch characterizes it, there was a series of interactions.
17 They did coalesce to the extent that Dr. Rozgonyi understood
18 our position in the case and our theories of it, and did so
19 well enough to be able to give us his preliminary view on
20 the subject.

21 The other extreme, the Koch Court talks about a
22 situation where you have only one meeting with counsel,
23 which is not the case here. There were at least two
24 substantive discussions.

25 It's true that Dr. Rozgonyi was not retained,

1 although he quoted us a rate and we proposed to retain him.
2 He was supplied with some specific material in the case,
3 namely, the patents in reference to the particular portions
4 that we wanted him to think about, and, of course, our
5 discussions with him about our thinking. And he was
6 requested to perform a service. Essentially, we asked him
7 to give us his preliminary thoughts on the substance of the
8 matter.

9 There is a suggestion in Dr. Rozgonyi's
10 declaration that there is nothing in our conversations that
11 wasn't disclosed in the interrogatory answers. With due
12 respect to his recollection, in fact, the heart of our
13 discussion had to do with the defense under Section 112 of
14 the Patent Act, which is not a defense that was requested in
15 those interrogatories, and actually is not something that --
16 our thinking on that subject, at least, is not something
17 that we have been asked to share with MEMC. As a result, we
18 haven't.

19 So he knows about our theory of the case that up
20 to now had been confidential. It's a problem for us if he
21 picks up and switches sides.

22 While I realize that folks with these
23 qualifications, you can't exactly find one on every street
24 corner, there are a number of people who do this type of
25 work. I don't understand the contention that, in fact, MEMC

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1 would be without recourse if Dr. Rozgonyi were disqualified
2 in this case. In fact, they have retained another expert in
3 this matter, who has very strong credentials in this field,
4 and presumably could address these issues if they need him
5 to.

6 So we have a real concern here. I think we had
7 a legitimate expectation that we were speaking to Dr.
8 Rozgonyi on a confidential basis. And we would prefer not
9 to see him popping up on the other side. And we think we
10 have a right to request that.

11 (Pause.)

12 THE COURT: Counsel, we are back. Mr. Maurer
13 expresses his apologies.

14 Michael, are you finished?

15 MR. BRODY: Mr. Gaff has, I think, a brief
16 thought to add to this.

17 MR. GAFF: Your Honor, Brian Gaff here.

18 In my initial conversation with Dr. Rozgonyi,
19 the first thing I inquired into was any conflicts of
20 interest on his part, whether he was familiar with the
21 parties who are involved, did he have a working relationship
22 with any of them currently or any time in the recent past.

23 And he assured me that there were no conflicts.
24 And based on that representation, I then launched into a
25 discussion with him of the details of the case, the history

1 of the dispute, the parties, et cetera. And I can assure
2 you that I would never have had that conversation regarding
3 that subject matter with Dr. Rozgonyi had he indicated that
4 there was a conflict of interest, if, for example, he said
5 he had a relationship with MEMC.

6 It has always been my practice to tell an expert
7 witness in these discussions that the discussions are
8 confidential and that he should treat information
9 confidentially going forward.

10 Again, I wouldn't have had the conversation with
11 him had there been any representation on his part that there
12 could have been a conflict of interest.

13 Thank you.

14 THE COURT: Thank you. Is there anything else
15 that the plaintiffs' counsel wishes to add?

16 MR. BRODY: No, Your Honor.

17 THE COURT: Thank you. Can I please hear MEMC's
18 argument.

19 MR. VANDER TUIG: Yes, Your Honor. Mark Vander
20 Tuig for MEMC.

21 First of all, we would contend that even the
22 details that have been added to the conversations with Dr.
23 Rozgonyi by Soitec during the phone call today, they clearly
24 fall on sort of the initial screening informal relationship
25 side of the spectrum. The details that they have identified

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1 are those which you have to disclose to any expert to
2 determine whether or not that expert has the appropriate
3 knowledge to be helpful in the case.

4 I don't think they have identified anything by
5 identifying the copy of the patent and the Column 23 excerpt
6 that has been identified. It's simply the definition
7 section of the '104 patent. They have identified nothing
8 that is anything more than they have disclosed in this
9 lawsuit as far as their theories of the case, their
10 position.

11 Mr. Brody identified the fact that we never
12 asked about 112. But they have in Interrogatory No. 7,
13 which is attached as Exhibit D to our filing, they did flag
14 an ambiguous defense, which would be under 112, Paragraph 2,
15 they state the phrase "substantially free of agglomerated
16 intrinsic point defects," which happens to be the column
17 number that they referenced here, the column and line number
18 that they reference in their submission. That phrase, they
19 claim, is ambiguous and cannot be construed.

20 So they have disclosed their position that they
21 think that's indefinite under 112, it is my reading of that.

22 That was just a counter to Mr. Brody's point.

23 They have to identify under the law something
24 specific and unambiguous that would prejudice them if it is
25 revealed. I just don't think that they have done so here.

1 To address the point about the limited number of
2 experts in this field, it's true that there is, as Mr. Brody
3 points out, there is a limited number with the appropriate
4 qualifications. And I note that Soitec at the time it
5 contacted Dr. Rozgonyi had already retained several
6 witnesses with expertise in this field.

7 THE COURT: I read Soitec's argument, as far as
8 MEMC was concerned on this what you call, I guess, public
9 information or public concern, that MEMC has been able to
10 retain an expert in the same field.

11 MR. VANDER TUIG: They have one expert, that's
12 true. They have retained one expert. Their specialties are
13 a little different. The reason we approached Dr. Rozgonyi
14 was to explore different areas of expertise that wouldn't
15 have been covered by Bergholz, who is the other expert we
16 have retained.

17 THE COURT: All right. Have you finished your
18 arguments for MEMC?

19 MR. VANDER TUIG: Yes, Your Honor.

20 THE COURT: Is there any brief rebuttal that
21 Soitec wishes to present?

22 MR. BRODY: Your Honor, very briefly, Mr. Vander
23 Tuig is certainly correct that we indicated our view that
24 that phrase was ambiguous. The concern is that we talked
25 with Dr. Rozgonyi about our theories as to why that was the

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1 case. And that's what we shared with him, and that's what
2 we really would prefer not to share with Mr. Vander Tuig and
3 Mr. Evans until we get to the appropriate point in the
4 litigation.

5 THE COURT: Well, I had a chance to go over the
6 two cases I predominantly looked at, because they seem to
7 have been cited numerous times by both sides, the
8 Hewlett-Packard case and the Koch Refining Company matter, I
9 think both of them are instructive to this Court.

10 I note that one, the Hewlett-Packard case, is
11 from the Northern District of California. The Koch Refining
12 Company case is from the Fifth Circuit. But the issue the
13 way that I was looking at it was the standards that were
14 outlined in both of those opinions. And I also note that in
15 the Hewlett-Packard case there was a bit of a conflict as to
16 what information was conveyed to the expert. And I also
17 note that in the Hewlett-Packard case, the relationship with
18 the expert, from what I can tell, in that case certainly
19 advanced further in my mind, based upon information that was
20 discussed, than what necessarily occurred in this case.

21 For example, I think counsel in that case
22 claimed the topics he had discussed included impressions of
23 the patent, specific claim limitations, prior art, accused
24 inventions, the type of evidence needed to prove
25 infringement, and the names and qualifications of other

1 potential expert witnesses.

2 Of course, the expert characterized the
3 conversation very differently. So the Court in
4 Hewlett-Packard was faced with some conflicting differences
5 between counsel who had had the discussion with the expert
6 and the expert himself, not too unlike what we have here,
7 that there is a difference between what counsel remembers
8 and what the expert remembered.

9 In addition, that expert, I think, was
10 compensated for his time that he had spent in his analysis
11 on behalf of the party who had first contacted him.

12 There is a couple, I think, though, aspects that
13 can't be ignored. One is that although we as Courts have
14 the power to disqualify expert witnesses to protect the
15 integrity of the adversarial process, disqualification is
16 considered to be a drastic measure that the Courts impose
17 hesitantly and rarely.

18 Also, there is a difference between
19 communication between counsel and an expert and the
20 attorney-client privilege, which was pointed out in the
21 Hewlett-Packard case, noting that experts perform a very
22 different function in litigation than do attorneys, and they
23 are not advocates in the litigation but sources of
24 information and opinions.

25 What this Court is supposed to look at to

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1 determine if a disqualification of an expert is warranted,
2 based upon the prior relationship with an adversary,
3 includes whether the adversary had a confidential
4 relationship with the expert and the adversary disclosed
5 confidential information to the expert that is relevant to
6 the current litigation.

7 To do the analysis of whether the disclosures
8 were confidential is whether they were undertaken without an
9 objectively reasonable expectation that they would be so
10 maintained as being confidential or if, despite a
11 relationship conducive to such disclosures, no significant
12 disclosures were made, and therefore under those
13 circumstances disqualification would be inappropriate.

14 It is the burden on the party seeking
15 disqualification of an expert to demonstrate that it was
16 reasonable for it to believe that a confidential
17 relationship existed, and if so whether the relationship
18 developed into a matter sufficiently substantial to make
19 disqualification or some other judicial remedy appropriate.

20 And in evaluating the reasonableness of the
21 parties' assumptions, there are a number of factors that
22 were pointed out in the Hewlett-Packard case for this Court
23 to look at, which I think have been discussed by the parties
24 in this. And that Court also pointed out, as was oppositely
25 pointed out in the Koch case, that you could have

1 disqualification denied, that is, it is not warranted, even
2 if the expert has signed a confidentiality agreement with
3 the adversary.

4 Koch and Hewlett-Packard both recognized that
5 you don't have to have a confidential agreement already
6 signed. Both cases emphasized what was the relationship and
7 the expectation from, and really what is emphasized is
8 whether there was confidential information disclosed.

9 As I said, there is a different standard, to
10 some extent, as to what that confidentiality may very well
11 be. Different isn't the right word. It's not the same as
12 attorney-client privilege.

13 Confidential information is information of
14 particular significance which can be readily identified as
15 either attorney work product or within the scope of
16 attorney-client privilege. And the strategy of the
17 litigation is part of it that the Court takes into account.
18 However, as decided in the Hewlett-Packard case, I find that
19 the discussions between counsel and experts do not carry the
20 presumption that confidential information has been
21 exchanged. And the party is required to point to specific
22 and unambiguous disclosures that if revealed would prejudice
23 the party.

24 The Court is also required to consider the
25 issues of fundamental fairness, that is, asking whether the

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1 moving party was unduly disadvantaged and the opposing party
2 would be also unduly disadvantaged, and whether any
3 prejudice might occur if the expert is or is not
4 disqualified.

5 Having considered all those factors, in applying
6 it to this case, I am finding that Soitec hasn't met the
7 standards that have been outlined in both the Koch and the
8 Hewlett-Packard case.

9 Recognizing that there is some dispute between
10 the expert as to what was disclosed, I don't think
11 disclosing the patent and suggesting areas of the patent for
12 the expert to read is sufficient enough, falls into the
13 category of confidential information.

14 First of all, the patent is clearly not a
15 confidential document. And pointing out an area or areas
16 that they want the expert to concentrate on is insufficient,
17 in my mind, to necessarily meet the aspect of was
18 confidential information disclosed.

19 It to me is more like an initial screening
20 process, certainly the type of questions that I believe
21 Brian pointed out that he would have asked the expert, that
22 is to determine if he is qualified, to determine if there is
23 any conflicts of interest. And although, Brian, you may
24 have expected that everything you were going to say to him
25 was confidential, it still had to qualify that what you were

1 saying to him qualified as being confidential based upon the
2 relationship or lack thereof that existed between the expert
3 and counsel that was part of the conversation.

4 If, as you pointed out to me, Brian, you said
5 you wouldn't have continued the discussions if there had
6 been areas of potential conflict, that's fine. But
7 potential conflict does not necessarily mean information
8 disclosed rises to the level of being confidential. What I
9 have heard so far today, I don't find that to have existed.

10 So I am not going to disqualify Dr. Rozgonyi in
11 this case in light of the information that has been conveyed
12 to me both in the arguments today and in the written
13 submissions.

14 I also recognize that there is no doubt that
15 this is a limited area of experts. I find that just because
16 MEMC has retained an expert in this area, that suddenly
17 means that MEMC is locked in and solely -- and that goes to
18 somehow disprove that because it's been able to retain an
19 expert there are available experts elsewhere. I note that
20 parties frequently in patent litigation, and it doesn't seem
21 this litigation is any different in that regard, frequently
22 retain experts within the same field that may have a
23 sub-field of expertise that might be particularly important
24 to certain issues in the litigation.

25 I also find that some of the information that

1 would have, that you would expect it to have.

2 MR. BRODY: Well, it's got the conclusions.

3 THE COURT: I understand it has the conclusions.

4 MR. BRODY: The data, it's not an accident that
5 you have somebody write up reports on this sort of data.
6 The data requires interpretation, and it requires analysis.

7 THE COURT: And you are basically saying that
8 the sole basis given for MEMC's allegation of patent
9 infringement was the testing that MEMC had performed on the
10 donor wafer seized in the French case. Is that the same
11 argument, is that being made in this case?

12 MR. BRODY: Yes. In fact, the interrogatory
13 answer, we asked them why do you think we infringe. Their
14 answer was, well, we tested the wafers we seized and we
15 concluded that they infringed. So what I think we are
16 entitled to is both the data on which that conclusion rests
17 and the report drawing the conclusion and explaining the
18 basis for the inference from the data.

19 So it's a situation where we have, you know, a
20 contention of infringement that purports to be based on a
21 report, and they are giving us half of, you know, the
22 underlying data but not the report.

23 THE COURT: What do you do about their argument
24 that you could easily conduct your own further testing of
25 these wafers that are in your possession and find out why

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1 was disclosed, apparently disclosed by Soitec to the expert,
2 was also disclosed to the defense. I am not saying
3 necessarily all, but certainly a piece of it. So that again
4 removes the confidentiality aspect to me.

5 So, therefore, I am finding that, basically
6 denying the motion to disqualify Dr. Rozgonyi.

7 All right. I think there is a series of
8 different concerns, I believe, that have been expressed in
9 the other motion that was filed in this case. Let me just
10 pull that up, counsel.

11 Again, this is another motion by Soitec. First
12 of all, it deals with the test data summaries and then your
13 request for documents and deposition testimony relating to
14 the conception of the alleged invention at issue.

15 So am I correct, this is the two other remaining
16 issues that are both Soitec's?

17 MR. BRODY: That's correct, Your Honor.

18 THE COURT: Okay. Let's do the test data
19 summaries. Michael, what I would like to really know from
20 you is: What are you trying to get? I mean, you said that
21 MEMC has agreed to produce the raw test data. Understand
22 that you are talking to somebody that is completely ignorant
23 about this technological area, so I am not exactly certain
24 what the raw test data doesn't have that the written
25 technology report summarizing and analyzing the test data

1 they concluded in such a fashion?

2 MR. BRODY: I think there are two answers to
3 that. The first is, I think we are entitled to know -- I
4 don't understand --

5 THE COURT: You are entitled to know the basis
6 for their contentions.

7 MR. BRODY: Yes, exactly. Our view is that --
8 in fact, we have already produced to them documentation that
9 at least some of the wafers that were seized don't infringe.
10 They apparently reached a different conclusion. So we would
11 like to know what it is.

12 THE COURT: They seem to feel that there is an
13 argument that this is attorney work product.

14 MR. BRODY: Yes. I am not clear --

15 THE COURT: Would you prefer to hear their
16 argument as to the basis as to why it is attorney work
17 product before you try to answer that in the abstract?

18 MR. BRODY: Sure. I think that would probably
19 be more productive.

20 THE COURT: I do, too, because if somebody is
21 alleging attorney work product, the burden is on them to
22 show that it is. So that is my first question to MEMC.

23 MR. VANDER TUIG: Your Honor, the tests that
24 were run and the summaries that are at issue today were both
25 conducted and put together at the request of counsel for

1 litigation with Soitec. As such, we think that that is a
2 showing that it is attorney work product.

3 THE COURT: Let me put it this way: Haven't you
4 put into issue that Soitec infringes? And if these tests
5 were run to show that Soitec has infringed, even though the
6 attorney may have requested them being run, haven't you
7 directly put into issue that particular point?

8 MR. VANDER TUIG: That would be going towards
9 the waiver argument, I think?

10 THE COURT: Sort of, yes.

11 MR. VANDER TUIG: On that point we think that
12 the scope of work product waiver is narrowly construed, and
13 to the extent there was a waiver in our interrogatory
14 responses by alluding to the test data, our agreement with
15 Soitec's counsel to produce the raw test data, the numbers
16 generated by the test methodology that were relied on would
17 be the extent of that scope, that any kind of conclusions or
18 opinions of MEMC's employees who conducted the testing
19 concerning the test data would fall outside the scope of
20 that narrow waiver, if there was one.

21 THE COURT: Well --

22 MR. BRODY: I just want to make clear, we are
23 not contending that the production of the raw data was a
24 waiver, because we did have an agreement with Mr. Evans to
25 that effect.

22

1 THE COURT: And I wasn't reading that that is
2 what you were saying. I got the read from you, and I wasn't
3 talking about a waiver in the sense of production of, that
4 somehow you waived by producing the raw data.

5 My question is, haven't you put Soitec's
6 infringement directly into issue in this case? And in doing
7 that, if it's in issue, I don't know how protected anything
8 is, whether it is attorney work product or whatever. But
9 the information that they are asking for, is this
10 information that will be used in the case to prove
11 infringement?

12 MR. VANDER TUIG: No, Your Honor. We asked
13 Soitec to produce wafers in this case, in the Delaware
14 litigation, and they have. And tests have been conducted
15 and are being conducted on those wafers, and that will be
16 the subject of our expert reports in this case on
17 infringement, and we will not be relying on the prefiling
18 testing that occurred.

19 THE COURT: But you used the prefiling testing
20 to justify what you started off in this case. Is that
21 correct? So that you could avoid Rule 11.

22 MR. VANDER TUIG: That's correct, Your Honor.
23 We relied on the test data, the raw test data. We didn't
24 rely on, necessarily, the various opinions and discussions
25 that were in the report that was generated by MEMC's

1 employees at counsel's request.

2 MR. EVANS: Your Honor, we asked the employee to
3 answer a number of questions for us and look at a number of
4 different things. So he answered our questions in the
5 course of his report. The concern we have is that when we
6 produce anything -- and we will see it in the next question
7 with respect to conception -- every time you do something,
8 somebody says, well, you've waived up to that point, you've
9 waived up to that point, you've waived up to that point.

10 Our point is to the extent there is infringement
11 in the prefiling investigation, and we believe there is, we
12 have given them all that raw data and answered the
13 interrogatory as to our contention on that, the contention
14 interrogatory.

15 To the extent we ask an employee in the context
16 of an ongoing lawsuit, you know, specific questions and look
17 at things from different directions, that would seem to be
18 work product.

19 THE COURT: I see what you are saying.

20 MR. EVANS: So this is the employee's analysis
21 that was written from our perspective of, you know, in the
22 context of our discussions with him and what we wanted. All
23 the raw data, they can look at it, they can reach their own
24 conclusions.

25 Michael Brody, Mr. Brody said that there were

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1 some wafers where they believe they don't infringe. And we
2 have spoken with Mr. Brody, and we agree with him that on
3 the wafers that showed what we call agglomerated defects, we
4 have agreed with him that those wafers don't infringe.

5 So we don't have a dispute, I don't think, in
6 terms of what wafers are in true contention here and which
7 ones are not. And we are willing to give them all the raw
8 data, and then they can make their own arguments if they
9 think we have violated Rule 11, to make the argument as to
10 why they think the data doesn't support what we did. We
11 think it supports what we did.

12 THE COURT: When you gave them the raw data, did
13 you give them the protocols on how they were tested?

14 MR. EVANS: If we haven't given them how the
15 data was collected, we would certainly be happy to give them
16 the protocols for how it was collected, certainly, yes.

17 THE COURT: Because the raw data is worthless
18 unless you know how it was tested.

19 MR. EVANS: No. We are not going to hide
20 behind -- if they need that information or don't have that
21 information, we will certainly get that to them.

22 THE COURT: So is your argument to me, and
23 explain this to me, that by giving conclusions of why the
24 wafers that are still in dispute infringe, it would
25 constitute basically crawling into your mind as to the type

1 of questions that were asked of these employees in doing
2 their analysis?

3 MR. EVANS: Yeah. I think the employee's
4 analysis written for the attorney in response to
5 conversations with the employee is a work product document.
6 He has prepared it for us to address the questions that we
7 asked. And the raw data is what it is. And their expert
8 can look at the raw data and reach whatever conclusions they
9 want.

10 So it seems like the employee's impressions and
11 responses to our questions are classic work product.

12 THE COURT: I understand what you are saying
13 then.

14 Does that help you a little more, Mike, as to
15 what their basis is for the work product argument? And do
16 you have any response?

17 MR. BRODY: Yes, it does help me understand. I
18 know you won't be shocked to learn that I still see an issue
19 here.

20 THE COURT: Did you get the protocols, first of
21 all, on how the testing was done?

22 MR. BRODY: First of all, we haven't actually
23 gotten all the testing yet or the protocols.

24 We have had a very good-faith relationship, I
25 think, with Mr. Evans and Mr. Vander Tuig. And if he says

1 expert what do you think the data shows. We also want to
2 ask our expert, do you think that MEMC was justified in
3 reaching the conclusion that is stated as a contention in
4 the interrogatories. And part of that analysis is
5 understanding precisely the inference that's made from the
6 data to the contention. And that is what is in the report.

7 You know, we have got the conclusion, we will
8 get the data. But we are not being given the glue that
9 holds the two together.

10 In order to understand whether the contention
11 holds water, I think we are entitled to that.

12 Now, Mr. Evans, I have forgotten if it was Bob
13 or Marc, indicated that there would probably be further
14 testing, which there may well be. But that actually kind of
15 heightens the importance of exactly the report, because we
16 are entitled to test whatever we ultimately get against what
17 they themselves initially viewed as an appropriate
18 methodology for analyzing these wafers. You know, it may be
19 that the two are perfectly consistent. But it may well be
20 that they aren't.

21 We certainly ought to be in a position to
22 understand that.

23 The fact that questions were asked the first
24 time around that may or may not have been asked the second
25 time around, you know, again, is really very much fair game.

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1 he is going to give us everything up to the reports, it
2 would be uncharacteristic of him not to do that. So I am
3 confident he will give us full disclosure of what the
4 testing was and how it was done. And if we have other
5 questions, I am confident he will give us all that
6 underlying information.

7 I think the real focus here is on, you know,
8 essentially you have got the testing. You have got a
9 report. Then you have got an interrogatory answer that was
10 provided to us. The real focus is on that intermediate
11 step.

12 THE COURT: Yes.

13 MR. BRODY: And whether that is work product and
14 whether any privilege was waived.

15 I guess I would say that every expert report is
16 always based on underlying data. If it were sufficient to
17 simply disclose the underlying data, then we wouldn't have
18 some of the provisions that we have in Rule 26, and we
19 wouldn't have anywhere near the sort of disclosure that we
20 typically do, precisely because the reason you ask an expert
21 to prepare a report is to interpret data that is not
22 transparent to lawyers or judges or juries and about which
23 reasonable experts may disagree.

24 And in evaluating the data -- and more
25 importantly, I mean, it's not just that we want to ask our

1 Once you get past the step of talking about a consulting
2 expert, once you get to the point where you are relying on
3 an expert to support a contention made in a formal pleading,
4 I think all that stuff is out the window.

5 THE COURT: Well, now, I wonder about that.
6 That's the question I do have. If these individuals are not
7 going to be called as experts, or used as factual witnesses
8 for information to reach a conclusion -- the factual
9 information they may have, but whether or not they are
10 going -- what I was just told was that the types of
11 questions that were asked of these employees -- and this is
12 how I interpret it, and MEMC can tell me whether I am right
13 or wrong on this -- those types of questions that were asked
14 of those employees on these series of tests, and the
15 findings or conclusions they made, will not be used in this
16 case.

17 UNIDENTIFIED SPEAKER: That's correct, Your
18 Honor.

19 MR. BRODY: But they have already been used.
20 They formed the basis of a contention as to our
21 infringement. We can't know what the basis of that
22 contention is unless we know what the analysis was that was
23 done to get from the raw data to the contention.

24 THE COURT: Are you saying, then, that in all
25 circumstances, Mike, that if in support of responding to

1 contention interrogatories counsel uses information from a
2 consulting expert, that that consulting expert's analysis
3 then becomes free game?

4 MR. BRODY: I think if the factual basis for the
5 contention is a report from an expert, that expert is no
6 longer a consulting expert, because, precisely because the
7 work product the expert has generated is no longer being
8 held in confidence. It is being asserted as the basis for
9 the contention.

10 Think about it from the other direction, Your
11 Honor. If that information could be protected, then what
12 that, in effect, says is you are allowed to know what the
13 contention is but you are not allowed to know why the
14 contention is being made.

15 I just can't -- well, I think we are entitled to
16 that.

17 THE COURT: I understand.

18 MR. VANDER TUIG: Your Honor, if I may, we are
19 giving them all the facts and the protocols that underlie
20 the investigation. You know, the fact that they are getting
21 all the raw data, they are getting all the protocols for how
22 it is collected, they are going to get that.

23 Dr. Mulsamuel (phonetic), the person who wrote
24 the report, did not conduct all of the tests. I am not sure
25 if he conducted any of the tests. We had the testing

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1 facilities at MEMC that actually ran the tests. So those
2 are the people that actually did, I believe, most of the lab
3 work.

4 He wrote the report. When I say report, it's
5 not a Rule 26 report. It's: I asked him questions, he
6 answered the questions, and sent it to me in the form of a
7 report. But he is a nontestifying expert who we asked
8 questions about the data that was collected and he answered
9 them.

10 So it seems to me that this is -- if on a
11 contention interrogatory they suddenly get all of the
12 sources that the attorney uses to assemble and assess the
13 facts, as well as those independent sources' analysis of the
14 facts, well, then, it seems like contention interrogatories
15 automatically amount to a waiver in every circumstance, and
16 I don't know how that works.

17 I think you have got to give people the facts.
18 To the extent contention interrogatories are permissible,
19 you have to answer the contention. But they are not
20 entitled to all the work product you use in the context of
21 the answer you use with the contention interrogatory.

22 UNIDENTIFIED SPEAKER: Your Honor, if I could
23 very briefly. I think Mr. Evans's argument, you know, sort
24 of argues too much and too little.

25 On the one hand, if all you need is the facts,

1 the underlying data, and that's enough to satisfy their
2 obligation to explain the basis for their contention, then
3 they probably don't even owe us the testing data. They
4 could just say, you know, you have got the wafers, here are
5 the tests that were used, you can go ahead and test them
6 yourself.

7 But the point, I think, is that -- it remains
8 their burden of proof and we are entitled to understand the
9 factual basis for their contentions.

10 On the other side of the coin, Mr. Evans didn't
11 simply get the test results in the interrogatory answer. He
12 didn't ask Dr. Mulsamuel for a report because the data was,
13 you know, self-evident and transparent and there was no need
14 for any further analysis of it. He presumably asked for the
15 report because he needed help from an expert to draw the
16 inference that the wafers infringed.

17 I don't know that Dr. Mulsamuel went down the
18 claims and did an analysis for him. But presumably he gave
19 him enough information from the perspective of a person of
20 skill in the art of these kinds of testing methodologies
21 that let Bob do the legal analysis on his own.

22 I don't want Bob's legal analysis. I am not
23 entitled to it. But I do want to know what the basis of the
24 legal conclusions was.

25 THE COURT: The factual basis.

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1 MR. BRODY: Exactly.

2 THE COURT: Okay. I find that the raw data,
3 obviously, should be made available, which I understand.
4 The methodology for analyzing the wafers should also be made
5 available.

6 The issue gets a bit thornier as to how much
7 further beyond that point Soitec would be entitled to
8 information, because, clearly, Rule 26 recognizes experts
9 that are going to be called upon to testify at trial. And
10 basically it's practically anything and everything they
11 looked at you get access to, even if it didn't become part
12 of their opinion. Then you have got the balancing with it
13 experts that are used in consultation for the purposes of
14 assisting counsel.

15 I think it gets problematic, although I
16 recognize Soitec's argument that a conclusion was put into
17 the answers to interrogatories, and I think some
18 potential -- let me just try to remember -- response was
19 indicating some of the basis for why the conclusion was what
20 it was. And this is where -- I don't think that counsel is
21 entitled to know what questions were asked of the Doctor.

22 To the extent that, how he reached his
23 conclusion that there is infringement, that information I do
24 think Soitec is entitled to. That means that may very well
25 be parsing out portions of this report. I haven't seen his

1 report, so I can't determine that. And to that extent I
2 would be willing to look at it and give you an idea as to
3 what portions of that report I think are discoverable.

4 UNIDENTIFIED SPEAKER: Would you like us to
5 submit a copy, Your Honor?

6 THE COURT: Yes. And I could go through it,
7 because it's hard for me to explain it. But why he
8 concluded that they infringed, that type of information I do
9 think is disclosable, but not "Did you look at X to make
10 this conclusion" or "Did you look at Y" or "Have you looked
11 at this," that type of information I don't think is.

12 So it is parsing it out. I don't know whether
13 you want to try to go through one, run through and produce
14 it and see without me looking at it, because I am no expert
15 in this field by any stretch of the imagination.

16 UNIDENTIFIED SPEAKER: I haven't thought about
17 the report from that direction. So I want to look through
18 it and see.

19 THE COURT: Sure. And if you want me to review
20 it, I will, and try to give some direction as to where I see
21 what type of disclosures I think are appropriate and where I
22 don't think they are appropriate.

23 UNIDENTIFIED SPEAKER: I would feel more
24 comfortable, probably, with letting you be the arbiter of
25 what should and not be produced to me. Why don't we send

1 understand, you are requesting documents and deposition
2 testimony relating to the conception of the alleged
3 invention at issue. This I find to be a little thornier,
4 too, as far as analysis is concerned in this. I am really
5 trying to understand what information you are trying to get.
6 I guess you got to provide me with a little bit more
7 specifics, to the extent that you feel comfortable doing
8 that, and what information was allegedly provided, because
9 the two of you seem to be at odds as to what invention
10 disclosure and related testimony was conveyed, because
11 what's been pointed out to me -- and I know the Fed Circuit
12 does recognize this -- is that invention disclosures
13 generally fall within the category of attorney-client
14 privilege.

15 MR. BRODY: Is it all right if I start on this?

16 THE COURT: Absolutely. It is your motion.

17 MR. BRODY: Yes. We are not disputing that
18 invention disclosures are sort of prima facie privileged,
19 and this is a clear waiver issue.

20 Really, there are two things that we are asking
21 for. One is what I will call the '302, the bulk silicon,
22 let me put it that way, invention disclosure. And the other
23 is, we are asking to be allowed to pursue some questions
24 with Mr. Hejlek and Dr. Faister about some conversations
25 that they had.

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1 you a copy of the report confidentially, and go from there.

2 THE COURT: That is fine. Show me where the
3 areas that were not disclosed -- I don't want the raw test
4 data, thank you. It is not going to help me one iota. You
5 can send it to me. But I am not real comfortable I am going
6 to be able to figure out what that means.

7 UNIDENTIFIED SPEAKER: There is a fair amount of
8 volume on the actual test data.

9 THE COURT: I would imagine.

10 UNIDENTIFIED SPEAKER: We are going to give it
11 to them anyway.

12 THE COURT: Those two points definitely, I
13 think, the methodology and also the raw test data. I don't
14 know how long the report is or how it is broken down.

15 UNIDENTIFIED SPEAKER: It is not terribly long.
16 Why don't we put together a submission to you that sort of
17 explains what we think should stay in and what should stay
18 out and why in the context of what you are saying now. We
19 will forward it to you and then you can give us guidance or
20 tell us what to do.

21 THE COURT: That is fine.

22 The report, obviously, I think maybe -- if I
23 have any problems I will just get us back on the phone
24 again.

25 Okay. The next issue is, from what I

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1 Let me try to be brief about the factual
2 background. But I do think it's helpful here.

3 Basically, MEMC has two sets of patents. One is
4 sort of a patent on, if you will, chunky peanut butter. And
5 another is a patent on putting chunky peanut butter in a
6 sandwich.

7 MEMC disclosed the -- and, I guess I would add
8 that the patent on chunky peanut butter in a sandwich
9 essentially talks about how great chunky peanut butter
10 tastes and what a wonderful feeling it is.

11 MEMC has produced the invention disclosure on
12 chunky peanut butter. So one question is whether -- and
13 there is a separate invention disclosure on putting it in a
14 sandwich, which has not been produced.

15 So one question is whether disclosing the
16 invention disclosure or producing the invention disclosure,
17 the feature of the combination that makes it sort of novel
18 and patentable, is a waiver with respect to the subject
19 matter of the second disclosure.

20 There we think the argument is that the subject
21 matter of the second disclosure, if you will, or the second
22 patent, is inextricably tied up with the subject matter of
23 the first disclosure.

24 It's not that they are claiming that they
25 invented silicon on insulator or peanut butter and peanut

1 butter sandwiches. It is they are claiming that using a
2 particular type of material in these devices, these wafers,
3 makes them particularly desirable.

4 In fact, a very large portion, I don't know what
5 the exact percentage is, 30, 40, 50 percent of the
6 disclosure is sort of simply lifted verbatim from the patent
7 on peanut butter.

8 There is additional disclosure about making the
9 combination, making the sandwich. But there is no question
10 that the subject matter of the second patent encompasses the
11 subject matter of the first patent. Therefore, the subject
12 matter of the second disclosure encompasses the subject
13 matter of the first disclosure.

14 And they, in effect, are saying, well,
15 notwithstanding that we have waived the privilege with
16 respect to how you make the special spread, we are going to
17 preserve the privilege with respect to a sandwich containing
18 that special spread.

19 I think that's a pretty clear waiver. If it
20 weren't, even if it weren't, I think that the waiver is
21 compounded by the deposition testimony that we did get.
22 Apparently, what happened is that at some point after the
23 patent issued there was a conversation between counsel and
24 Dr. Falster, the inventor, patent counsel and Dr. Falster,
25 the inventor, about the circumstances under which he

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1 conceived this invention. Apparently, an issue arose as to
2 whether Soitec was a co-inventor, and, in fact, that is an
3 issue in the case, and Mr. Hejlek having testified as to a
4 conversation he had with Dr. Falster about whether, in fact,
5 Soitec was a co-inventor, and about a meeting that everybody
6 acknowledges took place about almost two years before the
7 patent was applied for, in which Soitec's folks and Dr.
8 Falster talked about essentially the combination, the
9 subjects of the patents in the case.

10 In addition, in their interrogatory answers, and
11 at Dr. Falster's deposition, the story that we have been
12 given is that he conceived of this sandwich in conjunction
13 with a meeting between him and Soitec where Soitec was
14 saying, in essence, we want to make a sandwich of this type.
15 We are looking for suppliers to provide us with this type of
16 peanut butter. Can you do it? And then he spent some time
17 explaining to them how he thought in fact he could.

18 So, you know, what we have got is a disclosure
19 in the interrogatories as to the circumstances under
20 which -- or some disclosure as to the circumstances under
21 which he claims to have conceived the invention, the
22 invention disclosure as to the critical element in the
23 combination. We have got testimony from counsel about his
24 conversations with Dr. Falster regarding what was disclosed
25 in the interrogatories.

1 I asked Mr. Hejlek if Dr. Falster's discussion
2 with him had been consistent with what was in the
3 interrogatories. And he was allowed to answer that
4 question, and he said yes. And then I asked, and did he
5 tell you anything else about the conception of the invention
6 or about the meetings. And at that point I was told that
7 the testimony was privileged. And then when I took Dr.
8 Falster's deposition, he wasn't even allowed to testify to
9 as much as Mr. Hejlek testified to.

10 So there is a disclosure out there that either
11 confirms or disconfirms what's disclosed in the
12 interrogatories and what Mr. Hejlek testified to. There is
13 presumably testimony available that goes beyond what was
14 said that's consistent with the interrogatory answer. And
15 we are not being allowed to get it.

16 I think it's a pretty fundamental rule of waiver
17 law that you can't get a little bit pregnant on these
18 things. If you are willing to disclose part of the story,
19 the stuff that helps, you just got to, you know, give the
20 rest of it up as well. We are entitled to the entire --
21 once they start down the road of sharing with us the
22 privileged information on the conception story, they have to
23 give us the rest of it. And they have given us the
24 invention disclosure on the peanut butter, which they
25 acknowledge is privileged, and which they acknowledge was a

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1 waiver. They have given us testimony about conversations
2 between counsel and the inventor on the conception of the
3 peanut butter, to the extent they are consistent with the
4 interrogatory answer on the conception of the peanut butter.
5 But when we ask, can we see the other stuff that might
6 disconfirm your story, that's when we get the stone wall.
7 And I don't think they can do that.

8 THE COURT: They seem to emphasize the timing of
9 this discussion as being significant.

10 MR. BRODY: I saw that. And I apologize. I
11 will express this directly. I don't see that as a response.
12 The fact that the conversation took place after the
13 application was filed probably goes to the question of
14 whether Mr. Hejlek should have disclosed it at some point.
15 But it doesn't go to -- the underlying question is, when did
16 he conceive the invention and under what circumstances. And
17 that's a huge issue in this case, because we think he did it
18 in conjunction with our people, that actually we gave him
19 the basic idea.

20 He says, no, no, no. I came up with it
21 separately. If Mr. Falster, Dr. Falster, had told Mr.
22 Hejlek last week, you know what, Ed? I have been thinking
23 about it, and Soitec is right, the fact that that came last
24 week or, you know, a year ago or five years ago doesn't have
25 anything to do with it.

1 The question is whether they have waived the
2 privilege with respect to facts surrounding the conception
3 of this invention. And the reality is that they have given
4 us admittedly privileged documents -- and they are not
5 asking for it back -- about the conception of the peanut
6 butter, that they have given us testimony about
7 conversations between inventor and counsel, which, you know,
8 are clearly within the scope of the attorney-client
9 relationship, and they want to give us some but not all.

10 The fact that the waiver, you know, the waivers
11 came both before and after, I suppose the application is
12 being prepared -- I am sorry, the invention disclosure and
13 the conversation came before and after the application was
14 prepared. But the waivers both came in the context of this
15 litigation. And they can't give us some and not the rest.

16 THE COURT: All right. Thank you.

17 From MEMC's part, please?

18 MR. VANDER TUIG: I guess I will start by
19 saying -- your question to Mr. Brody was what info are you
20 trying to get here. I think what they are trying to get and
21 what we agree they are entitled to are the facts surrounding
22 the conception of the invention claimed in the '104 patent.
23 And they have had a full opportunity, and already have
24 deposed the inventor, Dr. Falster, on this issue. And we
25 did not block on the facts surrounding the conception of the

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1 invention.

2 I wanted to make that clear.

3 The info that they are really seeking is, okay,
4 when did you come up with this idea and what were the
5 surrounding circumstances, that they have had full
6 opportunity to depose Dr. Falster on. Now we are just
7 dealing with the waiver issue. And I will take their points
8 one at a time.

9 The first point that they raise is that MEMC
10 waived the privilege it has in its '104 patent invention
11 disclosure by producing the invention disclosure relating to
12 the '302 patent, the perfect silicate patent. That
13 production of that document occurred in a separate
14 litigation concerning the '302 patent. And it has to do
15 with different subject matter.

16 The fact that the patents are somehow related, I
17 don't think that carries the day for Soitec. Patents are
18 received all the time on combination of prior developments.
19 Here, this is a classic situation where there was a prior
20 invention and that was built upon, and another patent was
21 received for the combination of prior invention and the new
22 invention.

23 I didn't notice that Soitec was able to find any
24 authority for the fact that, if you disclose one invention
25 disclosure, all related patents, all invention disclosures

1 for all related patents, the attorney-client privilege in
2 those documents is therefore waived. And I think that would
3 be a bad outcome and a very slippery slope.

4 Turning now to the argument that the
5 interrogatory response somehow waived the attorney-client
6 privilege with respect to conception, there we just set
7 forth the facts of the conception as testified to by our
8 inventor, Dr. Falster. And I just don't quite understand
9 how that can be a waiver of the attorney-client privilege.

10 Finally, turning to the testimony of the patent
11 attorney, Mr. Hejlek, to the extent, as you correctly
12 pointed out, Your Honor, the disclosure, the discussion
13 there -- let me back up a little bit.

14 After the prosecutions closed and the '104
15 patent issued and it was out in the public domain, Soitec
16 started making noise in the marketplace somehow that there
17 is some inventorship issue. And it is at that point that
18 Mr. Hejlek was approached to provide advice on the issue.
19 And to the extent there was any disclosure of the facts of
20 conception through Mr. Hejlek's testimony, it related to
21 that issue and not to anything that occurred during
22 prosecution.

23 I am kind of at a loss as to how they are
24 unfairly prejudiced and that they can't get the full facts
25 of conception when they are not allowed to probe the

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1 attorney-client privileged communications that occurred
2 after the patent issued, so we are dealing with, you know, a
3 hearsay witness -- I am just at a loss as to how they are
4 unfairly prejudiced if they are not allowed to explore those
5 communications.

6 MR. EVANS: Your Honor, one other point I would
7 make is, we answer interrogatories. We object at
8 deposition. We try to be respectful to process and we try
9 to make judgment calls as to where privilege starts and
10 stops. And we try not to get the Court involved with a lot
11 of them. We try to be sort of even-handed about it.

12 The frustration that I am feeling a little bit
13 is we provide discovery in good faith, and then suddenly we
14 turn around and we hear because we gave them something we
15 are entitled to more. And they try to walk you down the
16 slope.

17 Here, invention disclosures per the Federal
18 Circuit are clearly a privileged document. The invention
19 disclosure that we did give them was one that had been
20 produced in an earlier litigation. And in that earlier
21 litigation it was produced inadvertently, but it was
22 produced nonetheless. And so since it was out there and we
23 couldn't get it back in that case, we in good faith said,
24 well, it is no longer a privileged document, so we gave it
25 to them here. But it is a patent that is not related to the

1 priority of the patents in suit here. It was an earlier
2 patent. So it is an unrelated patent as a matter of
3 priority. As a matter of subject matter, Mr. Brody is
4 correct, a fair amount of it does appear in the '104 patent,
5 but it appears in the '104 patent in the context of
6 explaining one component, one part, if not the invention,
7 you know, that is at issue here.

8 So the law is pretty clear, these documents are
9 privileged. I don't understand why we answer an
10 interrogatory, we, you know, put witnesses up on the facts,
11 and now they think they are entitled to the privileged
12 documents that are also related to other areas, when the
13 Federal Circuit case law is directly against that.

14 THE COURT: Okay.

15 MR. BRODY: Can I respond, Your Honor?

16 THE COURT: Yes, please do. Because I am now
17 getting the feel that you are talking at cross-purposes.
18 But go ahead.

19 MR. BRODY: I think there are two critical
20 things here. First of all, the conception of the invention
21 happens when the inventor has in his mind a complete idea of
22 the invention. This invention involves making a sandwich
23 with a particular filling. And in order to have that
24 conception, it was necessary for Dr. Falster to have a
25 conception both of the filling and of the idea of using it

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1 in a sandwich.

2 They have admittedly waived the privilege as to
3 the first part of that conception, but they have insisted
4 that they are entitled to continue to assert the privilege
5 as to the second part.

6 That I just think is not -- the reason it is not
7 fair is because, with due respect, I am 98-percent sure that
8 when we get that invention disclosure statement, it's going
9 to indicate that he conceived of this two years later and
10 that he didn't acknowledge Soitec's role in it, or maybe
11 it's going to say that he thought of it when he met with
12 Soitec.

13 But one way or another, it is going to throw
14 light on whether he actually conceived of it on his own and
15 when he did so. They can't give us half of the story and
16 not the other half.

17 Second. With respect to the interrogatory
18 answer and the testimony, the interrogatory answer discloses
19 their contention as to how the invention was conceived.
20 When I was deposing Mr. Hejlek, I asked him about this
21 conversation with Dr. Falster. He acknowledged that it took
22 place. Then I said -- this is in Exhibit 4 at Page 152 of
23 the deposition:

24 Okay. Did Dr. Falster, did his description of
25 the conception of the invention differ in any way from

1 what's disclosed in MEMC's Interrogatory Response to
2 Interrogatory No. 5?

3 So I am asking him directly about a conversation
4 between attorney and client. And I am asking him about the
5 substance of that conversation. And I am asking was it
6 consistent with what's in your interrogatory answer. And he
7 was allowed to answer that question. And he said:

8 What's described here is consistent with what my
9 recollection is.

10 And then I said: Did he give you additional
11 information about the conception?

12 And Mr. Vander Tuig interposed an objection.
13 And I said, Well, right now I am not asking for the
14 substance. I am just asking whether anything else was
15 disclosed.

16 And Dr. Falster was allowed to answer. He said:
17 Yes, he shared more than what's here with me.

18 Then I said, What else did he share with you?

19 Then the objection was interposed.

20 So he was allowed to -- Hejlek was allowed to
21 testify that Falster said some things that were consistent
22 with what's in the interrogatory and what's been disclosed,
23 that he gave -- that he, Falster, gave Hejlek additional
24 information, and we weren't allowed to inquire about it.

25 So, you know, they -- if the second question was

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1 privileged, so was the first question. And if he is allowed
2 to answer the first question, he has to be allowed to answer
3 the second question. And what's more, if he is allowed to
4 testify, if they are going -- if he is allowed to testify as
5 to evidence that is confirmatory of their contention, we
6 have got to be allowed to see -- and if we are going to get
7 the disclosure that's confirmatory of his conception of a
8 piece of the invention that was prior to the Soitec meeting,
9 we have to be allowed to see the disclosure that goes to the
10 rest of the invention, and we have to get the rest of the
11 testimony.

12 I appreciate Bob's comments. But, frankly, from
13 our perspective, it's not that they are being kind of good
14 citizens about this. It's that they have disclosed the
15 stuff that helps them and they are withholding the stuff
16 that may or may not help them.

17 It's not just that there was a disclosure in a
18 prior case, but there was also disclosure in this case. And
19 they can't -- once they choose to start down the slippery
20 slope, they don't get to be the ones who decide to stop.

21 If there really was an inadvertent disclosure in
22 the prior case, then presumably they were entitled to get
23 that back. There is tons of law about how inadvertent
24 disclosure is not a waiver and documents can be gotten back.
25 All of that is well-established. Even if they couldn't have

1 gotten it back there, at least they could have contended
2 here that that disclosure was inadvertent and they could
3 have sought to reestablish the waiver in this case.
4 But they didn't. They gave us what they wanted
5 to give us on this story, and they haven't given us the
6 rest. And they just can't do that.

7 MR. VANDER TUIG: Your Honor, may I respond?

8 THE COURT: Sure.

9 MR. VANDER TUIG: I just wanted to point out
10 that -- first of all, we are not going to rely on Mr. Hejlek
11 as some sort of corroborating witness on conception, which
12 the unfairness argument seems to rely on. And secondly, on
13 the pages of that deposition transcript of Hejlek that
14 follow the part that Mr. Brody pointed out, we actually took
15 a break and Mr. Hejlek came back and described some of the
16 situations -- some of the facts, that he was aware of
17 various stuff relating to the meeting that they are
18 concerned about.

19 So I don't think it's accurate that we cut him
20 off and only allowed him to confirm the accuracy of the
21 facts in the interrogatory response. In fact, if you read
22 Pages -- this is in the exhibit, I can't remember which
23 exhibit -- but it is Pages 154 through to about 158 or so,
24 or even further, there is a point where the line was
25 eventually drawn is when they wanted to get into Mr.

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1 Hejlek's legal advice relating to the situation that
2 developed after the '104 patent had issued where the line
3 was drawn.

4 So this unfairness argument really, I don't
5 think there is much substance to it because they did
6 actually get from Mr. Hejlek all the facts that they wanted
7 relating to the October '96 meeting and what Mr. Hejlek was
8 aware of, the facts that he was aware of concerning that
9 meeting. I wanted to clarify that.

10 MR. BRODY: With due respect, first of all,
11 please do look at the transcript. You know, eventually we
12 were not allowed to inquire. But the fact that he was
13 allowed to answer further questions, you know, merely
14 compounds the waiver with respect to whatever may have
15 been -- whatever the underlying evidence is with respect to
16 Falster's conception.

17 At Falster's deposition, we weren't allowed to
18 ask anything. And we still haven't seen the disclosure
19 statement.

20 You know, it's not that we are looking to Hejlek
21 to corroborate Falster's testimony. Frankly, we think that
22 if we are allowed the discovery, we are going to be getting
23 evidence that disconfirms the contentions. And that is
24 exactly what we are looking for.

25 This isn't hearsay. This is testimony by the

1 inventor, who is an employee of the party, which makes it
2 squarely an admission.

3 So, you know, they can't have it both ways. It
4 can't both be the case that Hejlek's conversation with
5 Falster about conception -- and there is no question that
6 they had a conversation about conception -- it can't both be
7 that that conversation was privileged, which it clearly was,
8 and that they are allowed to testify as to that
9 conversation, and then say, but, you know, that's all you
10 get.

11 So we have got Hejlek's version of a
12 conversation on conception --

13 THE COURT: Let me just finish this. You should
14 have been entitled to get Hejlek's recollection of what the
15 conception was once it was allowed, you should have been
16 allowed to ask the Doctor the same type questions to confirm
17 it. The issue then that I think that is left is what do we
18 do about the invention disclosure statement.

19 UNIDENTIFIED SPEAKER: Let me speak directly to
20 that, if it is okay.

21 THE COURT: Yes. Because that, I will tell you
22 right now, is the one that is giving me probably the most
23 indigestion.

24 MR. BRODY: We tried to save the hard ones for
25 you, Judge.

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1 If we are entitled to that testimony, then the
2 reason we are entitled to the testimony is because there is
3 a subject matter waiver as to what was communicated between
4 attorney and client about conception. And that's exactly
5 what the written disclosure statement is.

6 You know, there apparently were three
7 communications between Falster and his lawyers about his
8 conception of this invention. One was the initial invention
9 disclosure on the bulk silicon patents, the peanut butter
10 patents. The second was a conversation between Hejlek and
11 Falster about the conception of the peanut butter sandwich
12 patent. And the third is the written disclosure about the
13 conception of the peanut butter sandwich patent.

14 If there is a waiver as to the first and the
15 third communications, then there is also a waiver as to the
16 second, because it's the same subject matter. It's the same
17 as if there had been a subsequent or a prior conversation
18 about conception. They can't waive with respect to one
19 conversation and not with respect to the other.

20 They can't waive with respect to the oral
21 communication and not with respect to the written
22 communication.

23 That is the unfairness.

24 THE COURT: Okay.

25 MR. VANDER TUIG: Can I respond, Your Honor?

1 THE COURT: Yes.

2 MR. VANDER TUIG: I would just like to point out
3 that Mr. Hejlek clearly said that he did not have a
4 conversation about conception. He had a conversation with
5 Dr. Falster about this October meeting from which Soltec was
6 making these inventorship allegations after the '104 patent
7 issued. If you look at Page 156 of the transcript that
8 Soltec submitted --

9 THE COURT: Let me say this: The problem that I
10 am facing in this is the fact that, apparently, is it Dr.
11 Falster, was cut off with some information relating to
12 conception. There was some exploration, and probably what's
13 been represented to me, further exploration allowed with the
14 attorney. And that was even piece-mealed out.

15 The problem that I have is, did that go to
16 waiving the -- and I think there was a waiver. If this was
17 confidential, you just don't suddenly say, we only waived
18 this section of it, we didn't waive the rest. I do think
19 you did.

20 The question I have is, that I am asking is,
21 does that constitute a waiver of the invention disclosure.

22 MR. VANDER TUIG: Well, Your Honor, my point was
23 that you did not -- that the Hejlek testimony was not to
24 conception but it was to the fact of this October '96
25 meeting which Soltec alleges was, when their employee came

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1 up with the idea, rather than the conception of the
2 invention. We submitted in our submission the fact that Mr.
3 Hejlek testified that he never had a conversation with Dr.
4 Falster about conception during prosecution of the '104
5 patent. And at Page 156 of the transcript that Soltec
6 submitted --

7 THE COURT: But that may go to inequitable
8 conduct. I don't know whether it goes to conception and
9 reduction to practice.

10 MR. VANDER TUIG: The point is they didn't talk
11 about conception. They talked about this October meeting,
12 which is different.

13 So to address one other point that he raised,
14 Dr. Falster was not cut off as to the facts of conception.
15 They had a full opportunity to explore all the facts
16 relating to his conception of the idea.

17 He was instructed not to answer when he was
18 asked what conversations he had with Hejlek after the '104
19 patent issued, that conversation we have been talking about.
20 He was not allowed to talk about that conversation. But he
21 was -- I mean, he testified fully about the facts of
22 conception.

23 I mean, there is no unfairness here, Your Honor.
24 They have all the facts they need. I am not sure what else
25 they want.

1 THE COURT: Let's look at Page 155. It starts
2 out where there was a meeting that was attended by Dr.
3 Falster at Soltec's office sometime in October of '96.

4 So he brought to my attention the meeting and
5 the fact that he conceived it before the meeting.

6 I am sorry, I overlooked that before. When you
7 say conceived it, I take it you are saying in conjunction
8 with the meeting, he had conceived the invention before
9 attending the meeting.

10 Then: Did he tell you when he had conceived it?

11 The answer was, I do not recall the date.

12 Not that he didn't know the date. That he
13 didn't recall it.

14 Did he tell you anything about the circumstances
15 under which he had conceived the invention?

16 No. That was a question you asked me before.
17 No.

18 So the privilege doesn't even apply then, I
19 guess, if I looked at this literally, the fact that Dr.
20 Falster has circumstances under which he conceived the
21 invention that he didn't share with his attorney, that
22 obviously isn't even subject to privilege.

23 Have you seen any written material corroborating
24 his recollection as to his conception of the invention?

25 Other than the invention disclosure, no.

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1 So, you know, those four series of questions
2 seems to be in conflict with one another. But what the
3 attorney said was he didn't tell him anything about the
4 circumstances under which he had conceived the invention.

5 Have you seen an invention disclosure
6 corroborating his concept of, his account of the conception
7 of the invention?

8 And then the attorney says, you asked his
9 account. Do you mean this account? I am not sure what you
10 mean because you sort of moved your hand like it was
11 supposed to communicate something.

12 I communicated that I was moving my hand, I
13 think nothing more.

14 Have you seen any written material corroborating
15 the account of the conception of the invention that's set
16 forth in Interrogatory No. 5 and apparently was communicated
17 to you sometime between 2001 and 2005?

18 I don't recall any such documents.

19 So he is saying I don't recall. He is not
20 saying he didn't have it.

21 Have you spoken with anybody other than Mr.
22 Falster about who corroborated his account?

23 Answer: As to what subject?

24 As to the conception of the invention that's set
25 forth in response to Interrogatory No. 5.

1 To corroborate the date, no.
 2 To corroborate any other aspect of the
 3 conception?

4 No.

5 So it is clear that he had conversations with
 6 Foster about something. But it's not clear to me what's
 7 even under the privilege at this stage of the game.

8 UNIDENTIFIED SPEAKER: That is one of the
 9 struggles, Your Honor, at the deposition, is to figure out
 10 where to draw lines.

11 THE COURT: That is the problem. That is the
 12 reason why I am finding that you are going to produce the
 13 invention disclosure. I think there is enough here that has
 14 caused -- I don't think the Court can, in the end, parse
 15 out, okay, this much we disclosed and we allowed it and we
 16 were good guys by disclosing it, but the rest of it we are
 17 going to protect. I think there has been a whole host of
 18 related subject matter that has been disclosed. I am not
 19 just relying upon the fact that the disclosure of the
 20 disclosure statement of the '104 patent was produced.

21 It seems to me that trying to draw these nice,
 22 little lines and areas is just, if you will excuse the
 23 expression, damned near impossible.

24 So the disclosure statement for the, my
 25 understanding of the patent that is in dispute here, which

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1 is, I think is the '302 disclosure, will be provided.

2 UNIDENTIFIED SPEAKER: It is the '104, Your
 3 Honor.

4 THE COURT: It is the '104 in this case but the
 5 '302 had been disclosed.

6 UNIDENTIFIED SPEAKER: Yes.

7 THE COURT: I got them confused. I apologize.
 8 Then the '104 will also be disclosed.

9 So I think I have covered all the issues that
 10 were addressed by the parties in their two submissions,
 11 except for the one thing that is left is if you wish me to
 12 do that review. And I will do it.

13 UNIDENTIFIED SPEAKER: Okay.

14 UNIDENTIFIED SPEAKER: Thank you very much for
 15 your patience, Judge.

16 THE COURT: It's not patience. It's just trying
 17 to parse out what you are asking me to do. And sometimes I
 18 can't do the impossible. It's just easier to try to draw
 19 some line someplace.

20 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

21 THE COURT: Thank you, all.

22 (Teleconference concluded at 12:05 p.m.)

23 - - -

24 Reporter: Kevin Maurer

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